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UNCLAS SECTION 01 OF 02 LILONGWE 000468

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SUBJECT: SUPREME COURT RULES ON FLOOR-CROSSING--40
GOVERNMENT SEATS AT RISK

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11. (SBU) Summary: Malawi's Supreme Court upheld the validity of the constitutional provision outlawing "floor-crossing" on June 15, putting the seats of over half of the ruling party's parliamentarians at risk. President Mutharika had challenged the provision due in large part to the fact that forty of his Democratic Progressive Party's seventy MPs had switched parties after their election. The Speaker of Parliament is now authorized to declare vacant the seats of those forty MPs, as well as one opposition parliamentarian, when Parliament resumes sitting on June 29. However, despite the finality of the Supreme Court ruling on the law itself, according to Malawi's Minister of Justice (who could also be affected by the ruling) any MPs affected will challenge the Speaker's application of the law at the High Court, and then, if that fails, the Supreme Court. Once all appeals are exhausted and the seats are finally declared vacant, the government will have to hold a large by-election to fill the seats. End Summary.

12. (SBU) In one of the last official acts of Supreme Court Chief Justice Leonard Unyolo, who has announced his plans to retire in July, the Court declared that in order to retain "accountability and integrity" in the democratic process MPs elected under the sponsorship of one party cannot later switch parties and maintain their seat in Parliament. While MPs who accept ministerial posts within government do not automatically put their seat at risk, their "conduct after being appointed" could be interpreted by the Speaker of Parliament to mean that they have crossed the floor. Finally, the court also ruled that the thirty-nine MPs elected as Independents are not affected by the constitutional provision. There are one-hundred and ninety-three seats in Malawi's Parliament.

13. (SBU) President Mutharika had challenged the floor-crossing provision, "Section 65" of Malawi's Constitution, in 2005 on the grounds that it was inconsistent with other constitutional provisions ensuring freedom of association. The constitutional court, an ad-hoc court consisting of three High Court justices, first upheld the provision on November 7, 2006 in an advisory ruling, against which Mutharika then appealed to the Supreme Court.

14. (SBU) The various political parties who have lost members may now petition the Speaker of Parliament to request that he declare vacant the seats of

MPs who have switched parties. The Speaker's first chance to put the law into practice will come when Parliament reconvenes on July 29, after the official month of mourning following the death of First Lady Ethel Mutharika. However, once the Speaker enforces the law, government parliamentarians will try to take the issue back to the courts, this time challenging the Speaker's application of the law instead of the constitutionality of the law itself. Minister of Justice Henry Phoya told Embassy officials "at this point there is nothing to do about the law, but our MPs can challenge the Speaker's implementation of the law, and obtain an injunction against their removal until that challenge is heard in court." This process, according to Phoya, could be a long, drawn out ordeal. If these appeals are denied, the MPs affected will lose their seats, and elections will be held to fill the vacant seats.

¶5. (SBU) The ruling is a significant public victory for both the opposition United Democratic Front (UDF) and Malawi Congress Party (MCP). Both parties have lost MPs to Mutharika's DPP, and both have been outspoken critics of the DPP's attempts to "poach" MPs from their parties. Sixteen current cabinet ministers--including the Ministers of Foreign Affairs, Home Affairs, Transport, Justice and Trade, among others--were elected on a UDF ticket, while three ministers ran as MCP candidates. Twenty-one additional parliamentarians ran on the tickets of smaller parties, and then later joined the Mutharika's DPP. While the floor crossing provision had been used occasionally in the past, it has never been used to target such a large group of MPs.

¶6. (SBU) However, because of Malawi's unique democratic system--a hybrid between U.S. and U.K. models--the potential loss of over half of the government's parliamentarians does not put Mutharika's government in jeopardy. Without a constitutional provision for either a vote of no confidence or an early election, the current

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government will continue to rule the country through 2009 regardless of its support in Parliament. Additionally, those government ministers who might lose their seats in the House could retain their ministerial positions, as government ministers are not required to be Members of Parliament. However, passing reform-focused legislation, already difficult for Mutharika's government without a majority in Parliament, will prove almost impossible with a further weakened ruling party.

¶7. (SBU) Comment: The government's strategy, articulated in past conversations between Embassy officials and cabinet ministers and reiterated by Phoya, is to delay the application of the law as long as possible. With the snail-like pace of Malawi's judicial system, the DPP is betting that they will be able to push out the implementation of Section 65 as far as possible, with the hope that the next general elections in 2009 will make the issue moot. However, the high profile nature of this case makes it unlikely that the opposition, the courts, or civil society (who have lauded the decision as a check on unprincipled MPs) would accept excessive delays in implementation of the Supreme Court ruling. If the government is not able to delay the ruling's implementation indefinitely it will eventually have to face the prospect of losing a number of seats and holding by-elections. Those by-elections could prove financially costly to both the government and the DPP party, which is still not firmly established in many areas at a grass-roots level. And while most government candidates would be favored to win back their seats, in a zero-sum election such as this any loss would only further strengthen the opposition while weakening the government. End Summary.

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